No. 00-1519

IN THE

SUPREME COURT OF THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Petitioner,

-vs.-

RALPH ARVIZU

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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District of Arizona

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respectfully submitted,

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Ralph Arvizu, by and through his court appointed counsel, Victoria A. Brambl, Assistant Federal Public Defender, respectfully requests this Honorable Court for leave to proceed in forma pauperis in responding to the government's petition for a writ of certiorari. As grounds therefor he states that undersigned counsel was appointed pursuant to the Criminal Justice Act, was appointed by the United States Court of Appeals for the Ninth Circuit, and he is unable to retain counsel and pay for costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the Petitioner respectfully requests that he be granted leave to proceed in forma pauperis.

Respectfully submitted this 3rd day of May, 2001.

FREDRIC F. KAY
Federal Public Defender
Victoria Brambl
VICTORIA A. BRAMBL
Assistant Federal Public Defender
Attorney for Respondent

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals correctly follow and apply the rule of this Court in *United States v. Brignoni-Ponce, 422 U.S. 873 (1975),* when it considered the "totality of the circumstances" and found no reasonable suspicion to stop Mr. Arvizu's van, when it was traveling along a public road adjacent to a popular national recreation area in the middle of the day, where the Border Patrol Agent offered the following reasons for the stop: (1) the van slowed as it approached the Border Patrol vehicle; (2) Mr. Arvizu failed to acknowledge the agent; (3) the children in the back seat began to wave at the agent; (4) agents had stopped one minivan containing marijuana during the past month on the same road; (5) the agent did not recognize the van; (6) the van was validly registered to a Douglas address located in a block that he claimed is notorious for smuggling activity; (7) the children's knees were slightly elevated; (8) the 2:15 p.m. stop occurred forty-five minutes before Border Patrol shift change; (9) smugglers sometimes use minivans; (10) the road could be used for checkpoint evasion; and (11) the road was sometimes used by smugglers? Does the decision fail to follow this Court's precedent or create a conflict with other circuits?

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Respondent, Ralph Arvizu, through counsel, respectfully requests this Court to deny the petition for writ of certiorari and refuse to issue a writ to review the judgment and opinion of the Ninth Circuit Court of Appeals in *United States v. Arvizu, 217F.3d 1224 (9th Cir. July 7, 2000),* amended, *232 F.3d 1241 (9th Cir. Dec. 1, 2000).*

STATEMENT

This case began when Border Patrol Agent Stoddard learned of a sensor hit along Leslie Canyon Road. The sensor does not detect border crossing activity because it is located twenty or thirty miles from the international border. (12/7/98 Tr.34). Agent Stoddard had no reason to believe the vehicle had recently crossed the United States-Mexico border, only that it was traveling on Leslie Canyon Road.

The temporary checkpoint is approximately thirty miles from the international border and is not operational daily, but once it begins running it stays open for two months at a time. (12/7/98 Tr. 10,33-4). Although the checkpoint was operational on January 19, 1998, the government presented no evidence that smugglers knew when the checkpoint operated or that smuggling occurs whether or not the checkpoint is operating. In fact, Border Patrol Agent Stoddard testified that he did not remember how long the checkpoint had been operational on January 19, 1998 and there is "no rhyme or reason" as to when it is open. (12/7/98 Tr.34).

The defense introduced as an exhibit a map depicting the area, which is appended to this response.[1] Although Leslie Canyon Road is not within the Coronado National Forest, roads leading from the area access the forest, including recreational areas (both camping and picnic areas) and the Chiricahua National Monument.

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[1]A map of this area is set forth in the Appendix. For this Court's convenience counsel highlighted in blue Mr. Arvizu's route of travel and added several numbers marking areas referred to during testimony: Number 1 marks the Border Patrol checkpoint; Number 2 marks the approximate area of sensor activity; Number 3 marks the approximate area where Mr. Arvizu's vehicle passed Border Patrol Agent Stoddard's stationary vehicle; and Number 4 marks the approximate area where the stop occurred. These marks have been added for this Court's convenience and follow the testimony during the suppression hearing. The defense introduced this map as an Exhibit [1A] during the suppression hearing and added the highlighted areas and numbers to assist the Ninth Circuit Court of Appeals.

The government states that when the vehicle turned west from Leslie Canyon Road onto Rucker Canyon Road, it was heading away from recreational areas in the National Forest accessible from east Rucker Canyon Road, implying there were no recreational destinations along the route the minivan traveled. This is not so. The government ignores the many areas accessible along the van's route of travel. (Pg.3-4). There were many legitimate destinations even after Mr. Arvizu turned onto Kuykendall Cutoff Road, including the northern portion of Chiricahua National Monument, campgrounds in Turkey Creek, Onion Saddle, and Buena Vista Peak, and scenic locations such as Rock Canyon and Lookout Tower. The government's map does not depict these areas. Moreover, Kuykendall Cutoff Road is an aptly-named shortcut for all eastbound motorists traveling toward Willcox and New Mexico. (12/7/98 Tr.76-9).

During the suppression hearing, the government claimed the roads Mr. Arvizu traveled – Leslie Canyon Road, Rucker Canyon Road, and Kuykendall Cutoff Road – are normally traveled by four-wheel-drive vehicles. Agent Stoddard conceded, however, that sedans or vans are capable of driving on the roads. (12/7/98 Tr.21,46). Agent Stoddard also testified Kuykendall Cutoff Road was unsuitable for passenger vehicles because it is only maintained occasionally and there are a lot of washouts when it rains. (12/7/98 Tr.21). Victor Chacon, an investigator for the Federal Public Defender's Office and a former resident of Douglas, testified there were no travel restrictions on Leslie Canyon, Kuykendall Cutoff, or Rucker Canyon Roads. (12/7/98 Tr. 61-2). When he retraced Mr. Arvizu's route, he did not need to put his vehicle into four-wheel drive during any portion of the route. (12/7/98 Tr. 61-2).[2]

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[2]The government's petition omits the district court judge's finding that the road "was a road that a vehicle sedan could travel on." (12/7/98 Tr.136). The district court judge made this finding despite Agent Stoddard's attempt to depict the roads as too rough for a minivan. (12/7/98 Tr.21).

Agent Stoddard found the van's turn onto Kuykendall Road "significant" because: the type of vehicle was not "normal;" he didn't recognize the vehicle; and the turn would be the final route of travel to circumvent the checkpoint. (12/7/98 Tr.22).

But Mr. Chacon's testimony established that many legitimate destinations are accessible along the route Mr. Arvizu traveled, including: houses and ranches peppered throughout the area; the community of Sunizona; several smaller settlements; Turkey Creek; Rucker Canyon; and Hunt Canyon. (12/7/98 Tr.69-70). The area includes Chiricahua National Monument, which is popular for hiking and bicycling, as well as sightseeing, picnicking, and camping. (12/7/98 Tr. 70). The area is also very popular amongst Douglas area residents who use it for recreational purposes. (12/7/98 Tr.70). There are also houses, ranches, and schools throughout the area. (12/7/98 Tr.69-70). Mr. Chacon also explained how the route Mr. Arvizu traveled would have been a shortcut for someone traveling from Douglas to any area accessible from Interstate-10, traveling east, such as Wilcox (but it would not be a shortcut traveling west on Interstate-10, such as from Douglas to Tucson). (12/7/98 Tr. 76-9). Mr. Chacon also testified that he could safely drive a two-wheel-drive, low-clearance vehicle on each of the roads. (12/7/98 Tr.81).

Agent Stoddard admitted he was not "real familiar" with Chiricahua National Monument but knew "that it exists in the area." (12/7/98 Tr.35). He conceded it is a scenic location visited by many people. (12/7/98 Tr.35). All of the roads are open to the public. (12/7/98 Tr.37;67). In fact, cars traveled this road about four times per eight hour shift or twelve times per day. (12/7/98 Tr.12-13). Thus, the route Mr. Arvizu traveled was neither seldom-used nor remote.

Agents typically learned of sensor hits every couple of hours in this area. (12/7/98 Tr.39-40). But there was no testimony that alien or narcotics smugglers account for more than a small

proportion of these "hits."

The government claims, without citing the record, that Agent Stoddard "knew" a vehicle turning right onto Kuykendall Cutoff Road would "avoid the checkpoint and proceed to Tucson or Phoenix with minimal law enforcement surveillance." (Pg.4). The record is silent about the extent of law enforcement surveillance along that route and Agent Stoddard never claimed to "know" that the van was avoiding the checkpoint. Of course, Agent Stoddard could not have "known" that a car would turn west along I-10 toward Tucson, as opposed to east toward Willcox or Lordsburg, or that the car would not turn off into one of the camping areas or picnic sites along the route.

Agent Stoddard testified that 2:15 p.m. is close to a 3:00 p.m. shift change when agents conducting roving patrols return to the checkpoint. (12/7/98 Tr. 11). Shift changes occur three times per day. (12/7/98 Tr.31). But Agent Stoddard conceded that the time at which Border Patrol agents return to the checkpoint for shift change depends upon their location – how far they are away from the checkpoint. (12/7/98 Tr.31-2). Agent Stoddard also conceded that agents might use Leslie Canyon Road -- the very road he claimed Mr. Arvizu used to avoid Border Patrol -- to return to the Border Patrol checkpoint at shift change. (12/7/98 Tr.33).

Agent Stoddard recalled an incident related to him by another Border Patrol agent involving a minivan traveling in the same general area from which several bales of marijuana were ejected. (12/7/98 Tr.12). The incident had occurred approximately one month earlier. (12/7/98 Tr.12). The agent in that case apprehended the van and that incident was completely unrelated to the events in this case. (12/7/98 Tr.12,38-9). Agent Stoddard admitted he had never been involved in a narcotics smuggling arrest in this area although he had been involved in alien smuggling stops. (12/7/98 Tr.39).

Absent from the government's proof is any indication that there was anything unusual about the minivan, such as tinted or obscured windows or the appearance of being heavily laden. Although Agent Stoddard did not recognize the van, he did not claim to know all the vehicles in the area and did not dispute that people other than local residents use the roads in question.

Agent Stoddard decided to wait for the vehicle along Rucker Canyon Road, which is a road linking Leslie Canyon Road to Kuykendall Cutoff Road and, as the name suggests, is a shortcut. (12/7/98 Tr.42). Agent Stoddard's vehicle was stationary when Mr. Arvizu's vehicle passed by. (12/7/98 Tr.40). He did not have radar but guessed the van's original speed as approximately 50 to 55 mph. (12/7/98 Tr.40). Agent Stoddard attached significance to Mr. Arvizu's vehicle being a Toyota minivan, claiming it is a "very commonly used vehicle to smuggle both illegal aliens and narcotics." (12/7/98 Tr.18). The agent did not back up this statement with any facts, statistics, or anectodal evidence, however.

The vehicle slowed down to approximately 25 mph and turned to the right, following a fork in the road. (12/7/98 Tr.40). Agent Stoddard conceded Mr. Arvizu's driving was not hazardous and did not obstruct traffic. (12/7/98 Tr.41). Again Agent Stoddard could only guess the speed of Mr. Arvizu's van because he was stationary and not using radar. (12/7/98 Tr.40). There was no testimony that Mr. Arvizu's driving was unsafe or violated any traffic laws.

Agent Stoddard described Mr. Arvizu's posture as rigid, with both hands on the steering wheel. (12/7/98 Tr.18). He further commented Mr. Arvizu did not look at him and acted "as if he was ignoring me." (12/7/98 Tr.18). Agent Stoddard also claimed a passenger appeared "fairly uptight as well," though he explained no underlying basis for this subjective belief. (12/7/98 Tr.18). Agent Stoddard denied that law-abiding citizens sometimes react in such a way to law enforcement

officers, claiming "most of them look ... and would give us a friendly wave;" he interpreted a rigid posture as "usually indicat[ing] that they were trying to hide something." (12/7/98 Tr.42).

Despite this, Agent Stoddard then claimed he became even more suspicious when the children in the van began waving at him. He claimed that "it wasn't in a normal pattern" and "it looked like they were instructed" to wave at him. (12/7/98 Tr.20,44). He also noticed the children in the backseat were sitting as if their feet were resting on something ("cargo"), with their knees slightly higher than normal. (12/7/98 Tr.7,19). The children's knees, however, were not even as high as chest level. (12/7/98 Tr.43). This factor is as suggestive of resting on pillows, camping supplies, or suitcases as of resting on cargo.[3]

Agent Stoddard decided to follow Mr. Arvizu's vehicle. The vehicle signaled a turn onto Kuykendall Road "kind of early," briefly turned off the indicator, then turned it back on and turned. (12/7/98 Tr.20-1,44-5). To drive from Rucker Canyon Road onto Kuykendall Road does not require a turn but a motorist must follow a right-hand fork or "T" in the road. (12/7/98 Tr.54,71,80). The road is not as well maintained as other area roads but Agent Stoddard conceded that sedans or vans can safely drive on it. (12/7/98 Tr.21). Agent Stoddard's reports did not mention any unusual road conditions, such as flooding or wash-outs along any of these roads. (12/7/98 Tr. 47).

Agent Stoddard then checked the van registration over the radio. The van was not stolen, had valid Arizona license plates, and was registered to Leticia Arvizu at 403 4th Street in Douglas, Arizona. (12/7/98 Tr.48). Agent Stoddard claimed the 400 block of Douglas, Arizona was "one of the most notorious areas" of narcotic and alien smuggling in the Douglas area. (12/7/98 Tr.22). He

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[3] Agent Stoddard's use of the word "cargo" was surely an afterthought because he claimed he stopped the van for suspected alien smuggling, not marijuana. (RT19;ER49).

admitted that in his report he described the area only as being "notorious" for alien smuggling. (12/7/98 Tr. 48-9). Agent Stoddard conceded that he had no information or intelligence suggesting any illegal activity -- either drug or alien smuggling -- at 403 4th Street. (12/7/98 Tr.49). Nor did Agent Stoddard have any information associating illegal activity with Leticia Arvizu, Ralph Arvizu, or the van. (12/7/98 Tr.50).

Agent Stoddard did not testify that, in his experience, smugglers act as Mr. Arvizu did.

After checking the van registration, Agent Stoddard decided to stop the van, not to check for drugs, but to perform an immigration check on the occupants:

> Q. Now, your report indicates that you stopped Mr. Arvizu's vehicle, not because you thought it had drugs in it but to perform an immigration check on the occupants. Is that right?
>
> A. Correct.

(12/7/98 Tr.23,50). Agent Stoddard conceded he made the stop despite there being nothing about the appearance of the van's occupants that made him suspect they were illegal aliens. (12/7/98 Tr.50). Agent Stoddard did not stop the van for a traffic violation. (12/7/98 Tr. 41).

The Ninth Circuit ruled that the stop was illegal under the "totality of the circumstances" and the illegality of the stop tainted Mr. Arvizu's consent. The Court found: "This is a classic case of obtaining evidence through the exploitation of an illegal stop, as is the case in which an officer's suspicions are aroused by what he observes following the stop, and on that basis obtains consent." (*232 F.3d at 1252*). The government did not include the ruling about consent in its petition for writ of certiorari and, therefore, this response does not discuss the facts or precedent surrounding the consent issue.

REASONS WHY THE PETITION SHOULD BE DENIED

ARGUMENT

I. Grounds Asserted for Granting Petition

This Court rarely grants petitions for writ of certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Rule 10, Supreme Court Rules*. Rule 10 provides two theoretically possible grounds for granting the government's petition for writ of certiorari: (1) Rule 10(a), where a court of appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter or has departed from the accepted and usual course of judicial proceedings to such a degree as to call for an exercise of this Court's supervisory power; and (2) Rule 10(c), where a court of appeals has decided an important federal question that has not been, but should be, settled by this Court, or decided it in such a way that conflicts with a relevant decision of this Court.

The government's petition for writ of certiorari alleges that the Ninth Circuit's opinion has departed fundamentally from this Court's totality-of-the-circumstances test, created a direct conflict with decisions of this Court and other Courts of Appeals, incorrectly excluded critical evidence, and undermined effective law enforcement in the Ninth Circuit. The following paragraphs show that the opinion correctly recited and followed the applicable precedent, considered all of the evidence, and has not created a conflict with other circuits. Thus, the government's argument boils down to a claim that the Ninth Circuit misapplied the facts to the law, which is both incorrect and undeserving of review by this Court.

II. Supreme Court Precedent

> Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government and among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.

Brinegar v. United States, 338 U.S. 160, 180 (1949)(Jackson, J., dissenting).

Every vehicle-stop case this Court has decided requires some discretion-limiting feature, such as probable cause, reasonable suspicion, or fixed checkpoints. This Court has consistently rejected the government's attempts to secure unbridled discretion to stop and search motorists in border areas. Yet, this is the real thrust of the government's petition.

The touchstone of Fourth Amendment jurisprudence is reasonableness. *Florida v. Jimeno, 500 U.S. 248 (1991).* Reasonableness is measured objectively, by examining the totality of the circumstances. *Ohio v. Robinette, 519 U.S. 33, 37 (1996).* This Court continues to reject a bright-line rule for reasonableness, recognizing the "endless variations in the facts and circumstances implicating the Fourth Amendment." *Florida v. Royer, 460 U.S. 491 (1983).*

Traditional Fourth Amendment jurisprudence required probable cause to justify detentions and seizures; cases allowing lesser standards involve detailed balancing of all relevant factors. *See Whren v. U.S., 517 U.S. 806, 817-8 (1996).* The first decision allowing detentions and seizures on less than probable cause was *Terry v. Ohio, 392 U.S. 1 (1968),* holding that law enforcement officers may temporarily detain for investigation a person who the officers reasonably suspect has committed or is about to commit a crime. *Id. at 20-4.* The officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, warrant the intrusion." *Id. at 21.* This Court acknowledged that even a limited search "constitutes a severe, though brief, intrusion

upon cherished personal security, and it must be an annoying, frightening, and perhaps humiliating experience." *Id. at 24-5.* This Court also cautioned that the reasonable suspicion determination "becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the detached, neutral scrutiny of a judge who must evaluate the reasonableness of the particular search or seizure in light of the particular circumstances." *Id. at 21.* Justice Douglas, the lone dissenter, warned: "there have long been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand." *Id. at 39.*

In *Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973),* the government sought a ruling that the Immigration and Naturalization Act allowed automobile searches without probable cause or reasonable suspicion within one hundred miles of the border. This Court held that a roving Border Patrol unit could not search an automobile for illegal aliens simply because it was in the general vicinity of the border (the search was about 20 miles north of the border), ruling that agents must have probable cause or consent to search. *Id. at 266.* This Court recognized the important law enforcement interests at stake, but ruled:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens along long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of individuals against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Id. at 273.

In *Brown v. Texas, 443 U.S. 47 (1979),* officers spotted a suspicious-looking man walking away from another man in an alley in an El Paso neighborhood notorious for drug trafficking. When

the officers stopped the man and asked him for identification, he refused, and they arrested him. This Court reversed the man's conviction because the officer's lacked reasonable suspicion to believe he was engaged in or had engaged in criminal conduct. Id. at 52. This Court ruled that when an investigatory stop "is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." Id. Thus, requiring specific, articulable facts for investigative stops does not give officers free reign to act on their own suspicions.

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) is the seminal case for roving Border Patrol stops near the border. Again, the government sought unlimited and unbridled discretion for Border Patrol agents to stop vehicles within one hundred miles of the border, relying upon provisions of the Immigration and Nationality Act. Id. at 876-7,882. This Court once again balanced law enforcement interests against personal liberty and ruled that Border Patrol agents must have reasonable suspicion to justify roving-patrol-stops. Id. at 881-2. Where reasonable suspicion exists, agents may stop a vehicle and question the driver and passengers about their citizenship and immigration status and may ask for an explanation of suspicious circumstances, but any further detention or search must be based on consent or probable cause. Id. This Court ruled: "We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic" and found that "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from the potential abuses inherent in "potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." Id. at 882-3. To allow otherwise would mean that "Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 miles of the 2,000-mile border, on a city street, a busy highway, or a

desert road, without any reason to suspect that they have violated the law." Id.

This Court set forth a non-exhaustive list of factors that agents could consider: (1) known characteristics of the area; (2) previous experience of the arresting agents with criminal activity; (3) proximity of the area to the border; (4) unusual traffic patterns of the road; (5) information about recent illegal trafficking of aliens or narcotics in the area; (6) behavior of the vehicle's driver; (7) appearance of the vehicle; and (8) number, appearance, and behavior of the passengers. Id. at 884-5. This Court also ruled that the Hispanic appearance of the vehicle's occupants, standing alone, did not provide reasonable suspicion. Id. at 885-6.

Brignoni-Ponce did not set forth a minimum number of factors necessary to constitute reasonable suspicion or any outcome determinative criteria. Such an approach would be antithetical to a totality-of-the-circumstances inquiry. *United States v. Lopez-Martinez, 25 F.3d 1481, 1484 (10th Cir. 1994).* A vital element of the *Brignoni-Ponce* test is whether the agent had reason to believe that the vehicle in question had come from the border. *United States v. Escamilla, 560 F.2d 1229, 1232 (5th Cir. 1977). Compare United States v. Lopez, 564 F.2d 710, 712 (5th Cir. 1977)("... when law enforcement agents interdict those traveling purely within this country, we must be extremely careful to ensure that reasonable suspicion does exist, even if the stop is close to the border).*

United States v. Martinez-Fuerte, 428 U.S. 543 (1976), ruled that fixed-checkpoint stops are constitutional because they only minimally intrude upon motorists and contrasted the greater intrusion of individualized vehicle stops and their potential for abuse:

> Routine checkpoint stops do not intrude similarly upon the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of the location of the

> checkpoints and will not be stopped elsewhere.[4] Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. ...

Id. at 559.

In *Delaware v. Prouse, 440 U.S. 648, 663 (1979),* this Court extended the reasonable suspicion requirement to all automobile users, ruling that the Fourth Amendment prohibits randomly stopping an automobile and detaining the driver in order to check the driver's license and automobile registration. This Court commented:

> We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety.

Id. at 657. Thus, subjecting automobile users to unfettered government discretion would seriously circumscribe the Fourth Amendment. *Id. at 663.*

In *Reid v. Georgia, 448 U.S. 438 (1980),* this Court examined a DEA airport stop of a traveler

[4]This sentence suggests that motorists who do not care to submit to checkpoints may evade them without adverse consequences. This is consistent with *Florida v. Royer, 460 U.S. at 498.*

based upon a drug courier profile, including: (1) defendant arrived from Fort Lauderdale, a cocaine source city; (2) defendant arrived early in the morning when law enforcement activity is diminished;[5] (3) defendant and his companion appeared to be trying conceal the fact they were traveling together; and (4) they carried no luggage except their shoulder bags. This Court ruled the agent did not have reasonable suspicion, finding that these circumstances described a large number of "presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as this would justify a seizure." *Id. at 440-1.*

United States v. Cortez, 449 U.S. 411 (1981) examined the stop of a vehicle which Border Patrol agents suspected contained illegal aliens. Agents followed distinctive "chevron" footprints on numerous occasions, deducing "chevron" was an alien smuggler; they identified a near-by load site and deduced a pattern of transport, then stopped a pickup with a camper they believed "chevron" might be driving, which had made a round trip in the area within a short period of time – between 4:30 and 6:30 a.m.. *Id. at 412-4.* This Court ruled the agents had reasonable suspicion for the stop, courts should take into account all of the circumstances, and there must be a particularized showing that this person is engaged in wrongdoing. *Id. at 418-9.* The opinion recognized the difficulties of patrolling the long, open border with Mexico but nevertheless emphasized the need for specificity of information. *Id.* Although agents may assess facts in light of their experience, hunches or instincts cannot form the basis of reasonable suspicion. *Id. at 419.* And, reasonable suspicion, like probable cause, is dependent upon the content of information possessed by the police and its degree of reliability – both quantity and quality are considered in the totality of the circumstances. Although conduct that does not necessarily indicate criminal activity may sometimes be relevant to the

[5]This is analogous to the government's shift change claim in this case.

reasonable suspicion inquiry, in light of the agents' experience, and the agents' background may provide a backdrop to assess the relevant facts, the inferences agents draw must be objectively reasonable. Id. at 418.

Florida v. Royer, 460 U.S. 491, 498 (1983) held that when an officer, without reasonable suspicion, approaches an individual, that person has the right to refuse to cooperate, ignore the police, and go about his business. *Compare Illinois v. Wardlow, 528 U.S. 119, 124-6 (2000)(holding that unprovoked flight from police officers, which is the consummate act of evasion, in a high crime neighborhood furnishes reasonable suspicion).*

In *United States v. Sokolow, 490 U.S. 1 (1989),* this Court again examined reasonable suspicion based upon a combination of factors, including probabilistic drug courier profile evidence and evidence of on-going criminal behavior, casting particularized suspicion upon the suspect. This Court reiterated that reasonable suspicion is neither easily nor usefully reduced to a "neat set of legal rules" and that to evaluate stops, courts must "consider the totality of the circumstances – the whole picture." Id. at 7. This Court emphasized that officers must have more an "inchoate unparticularized suspicion or hunch." Id. at 7. Any one of the factors the agent relied upon, including travel under an alias, was not, by itself, proof of illegal conduct, and was consistent with innocent travel, but taken together they amounted to reasonable suspicion. Id. Agents must articulate factors, but some of the factors may be set forth in a profile. Id. at 10.

In *Ornelas v. United States, 517 U.S. 690 (1996),* this Court established a *de novo* standard of review for reasonable suspicion and probable cause issues, emphasizing that reasonable suspicion is a "fluid concept" which takes its meaning from the context in which it is assessed and that it is not possible to articulate its meaning precisely. Id. at 695-6. This Court stated one of the policy reasons

for *de novo* review:

> Finally, *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined "'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"

Id. at 697 (internal citations omitted). This Court also acknowledged that because the reasonable suspicion inquiry is so fact-specific, "one determination will seldom be a useful precedent for another." Id. at 698 (internal citation omitted). But, this Court noted, there are exceptions, comparing *Sokolow* and *Royer*. Ninth Circuit jurisprudence (set forth below on pages 19-20) shows that there are many similarities between cases and one case can offer guidance for other similar encounters.

This Court continues to protect automobile drivers from unreasonable searches and seizures. *Knowles v. Iowa, 525 U.S.113 (1998)* held that officers cannot search a vehicle where the driver was stopped for speeding and issued a citation. This Court declined to extend the bright-line search incident to arrest rule to non-arrest situations because citation-only stops present less concern for officer safety and no concern for preserving evidence. Id. at 488.

Most recently, Justice O'Connor wrote:

> While clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no means trumps the values of liberty and privacy at the heart of the Amendment's protections. What the *Terry* rule lacks in precision it makes up for in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment. Over the past
>
> 30 years, it appears that the Terry rule has been workable and easily applied by officers on the street.

Atwater v. City of Lago Vista et. al.,___S.Ct. ___, 20001 WL 408925 (April 24, 2001)(O'Connor,

J., dissenting).

III. Analysis in this Case, Precedent in the Ninth Circuit and Other Circuits

The Ninth Circuit followed the totality-of-the-circumstances test this Court set forth in *Brignoni-Ponce.* The opinion does not hold that agents cannot consider the totality of the circumstances. Instead, the Ninth Circuit examined all of the factors Agent Stoddard considered and ruled that some of the factors had no weight, under the circumstances of this case, and the remaining factors were entitled to some weight, but when considered collectively did not give rise to reasonable suspicion. This is just what reviewing courts are supposed to do – determine the relevance of factors relied upon, what weight the factors carry, and then decide whether there was reasonable suspicion in light of the weight and relevance of all of the factors. Otherwise, agents could use a variety of meaningless factors to justify stops founded on less than reasonable suspicion. Agents are still free to consider the whole picture. The Ninth Circuit did not abrogate or narrow the totality-of-the-circumstances test.

Agents in the field may, and should, consider everything. But considering everything and saying that a factor – just because an agent considered it – should be entitled to some weight are entirely different things. An agent could believe that an African-American man looked like he did not 'belong' in a Cadillac and might consider that fact suspicious. Although considered by the agent, no court would condone the use of such a factor in any reasonable suspicion calculus. *See United States v. Armstrong, 517 U.S. 456 (1996); Brignoni-Ponce, 422 U.S. at 886-7 (holding Hispanic appearance alone is insufficient to justify a stop); Brown v. City of Oneonta, New York, 235 F.3d 769, 776 (2d Cir. 2000); United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000), cert. denied, 121 S.Ct. 211 (2000).* There must be an objectively reasonable basis to conclude that a

factor, alone or in combination, was suspicious; therefore, courts must determine whether an agent's reliance on a given factor or factors was objectively reasonable.

Comparison to another frequently-litigated area of law using a totality-of-the-circumstances approach is illustrative. Courts must examine the totality of the circumstances in determining the voluntariness of a defendant's statement. Yet no one would seriously argue that just because the defense listed ten weak or irrelevant factors supporting involuntariness, that courts must attribute weight to all of them and find a statement involuntary.

As the Ninth Circuit opinion states, reasonable suspicion is not a numbers game. *(232 F.3d at 1247, n.8).* It does not mean that agents may recite any list of factors and, if they reach a magic number – eight, ten, twelve, the stop is automatically upheld. The opinion recognizes that different factors have different levels of significance, depending upon their context: "Thus, where a stop is based upon a number of factors, each of which carries only minimal probative weight, quantity does not necessarily make up for the lack of quality." *(232 F.3d at 1247, n.8).* And although *Sokolow* teaches that the sum of conduct can be greater than its individual components, adding together factors which are "zeroes" can never equal reasonable suspicion. The Ninth Circuit's approach is just what is required – determining whether the combination of factors the agent relied upon amounts to reasonable suspicion. The innocuous and generalized factors in this case described a large number of innocent motorists and did not focus suspicion upon Mr. Arvizu.

The totality-of-the-circumstances test does not obligate courts to attribute weight to a factor that has no probative value.[6] The opinion merely repeated what the Ninth Circuit has often held –

[6] For example, given demographic changes, Hispanic appearance is of such little probative value that it may not be considered in a reasonable suspicion inquiry in areas where Hispanic residents comprise a substantial portion of the population. *Montero-Camargo, 208 F.3d at 1131.*

when the flip side of a factor is used against a defendant, then it is a no-win situation – "heads I win, tails you lose." *Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994).* Factors that have such low probative value that no reasonable officer would have objectively relied upon them to make an investigative stop should be disregarded. The Ninth Circuit is not the only circuit to criticize repeated use of factors with no probative value. *See United States v. Lopez, 564 F.2d 710 (5th Cir. 1977)(criticizing factor of trunk riding high: "... the border patrol's position seems to be 'Riding high or riding low, either way a-searching we will go.'").*

The Ninth Circuit skeptically reviews oft-cited claims that equate innocuous conduct with suspicious activity. *See United States v. Garcia-Camacho, 53 F.3d 244,247 n.5. (9th Cir. 1995)("It is not difficult to imagine the government one day arguing that driving at constant speed constitutes suspicious conduct because the best way to evade Border Patrol agents is not to stand out by going faster or slower than the normal flow of traffic."); United States v. Montero-Camargo, 208 F.3d at 1136 ("[i]t is, in fact, difficult to imagine what [Defendant] could have done at that point that might not have appeared suspicious to a Border Patrol agent.").* The Ninth Circuit has repeatedly cautioned against "mere rote citations of factors which were held, in some past situations, to have generated reasonable suspicion, leading us to defer to the supervening wisdom of a case now before us." *United States v. Rodriguez, 976 F.2d 592, 594 (9th Cir. 1992).*

The factor-by-factor analysis the Ninth Circuit conducted in this case follows this Court's precedent and is not unique. The Ninth Circuit has conducted factor-by-factor analysis in numerous cases. *See Rodriguez, 976 F.2d 592: (finding no reasonable suspicion where the location was a "notorious" alien smuggling route, defendant did not acknowledge the agents, the car was the kind which could be used for smuggling, defendant looked at the agents several times in his rear view*

mirror, the car appeared to be heavily loaded, defendant was Hispanic.); United States v. Hernandez-Alvarado, 891 F.2d 1414, 1418-21 (9th Cir. 1989)(rejecting a stop based upon the nervous demeanor of defendant and the passengers, the driver's reduction of speed when the police vehicle approached, a two-way antenna on the vehicle's trunk, defendant's residence along the Mexican border in the Monte Carlo neighborhood which was under investigation for recent narcotics activity [there was no indication that the particular address on the vehicle's registration was under investigation], a license plate bracket indicating the car had been purchased from a dealership associated with drug trafficking, and the vehicle's large trunk.); Garcia-Camacho, 53 F.3d at 246-9)(finding no reasonable suspicion even though Interstate 5 is the quickest route for illegal aliens, defendants looked straight ahead and did not acknowledge the agents, the truck was of a kind that could be used for alien smuggling, the truck appeared heavily loaded, defendants were Hispanic males, fast driving, acceleration when defendants passed the agent's car, a lane change near the agent, the passenger had a surprised and terrified look on his face when he passed the agents, and the truck did not pull over for one and one half miles – finding that each of the factors could just as easily apply to law-abiding citizens); United States v. Jiminez-Medina, 173 F.3d 752 (9th Cir. 1999)(no reasonable suspicion despite the type of vehicle, the driver's preoccupation, the vehicle's slow speed, the vehicle's registration, Interstate 10's reputation as a corridor for alien smuggling, and the time of evening, stating: "[t]he law of this circuit teaches that the presence of such facts as driver preoccupation, slow speed, movement within one's own lane of traffic, and even coming from the wrong neighborhood do not give rise to legally sufficient "reasonable suspicion.").

Other circuits have also employed this same method of analysis. *See United States v. Buenaventura-Ariza, 615 F2d 29, 34-7 (2d Cir. 1980)(holding there was no reasonable suspicion*

under the totality of the circumstances in a DEA airport stop; the court examined each of the factors individually, finding that arrival from a source city, nervousness, failure to travel side by side, and failure to converse while walking though terminal were wholly insufficient and were not sufficiently unusual to create reasonable suspicion.); United States v. Kithcart, 134 F.3d 529 (3d Cir. 1998, rev'd on other grounds, 218 F.3d 213 (2000)(order remanding to district court to examine totality of circumstances surrounding stop, specifically requiring district court to consider each of the factors the government offered to support the stop); United States v. Brugal, 209 F.3d 353, 358 (4th Cir. 2000)(en banc), cert. denied, 121 S.Ct. 388 (2000)(examined individually the eleven factors the government offered for suspects' continued detention at checkpoint, including 3:30 a.m. travel time and defendant's claim that he was stopping for gas even though he had one quarter tank, he had just passed two well-marked gas stations, and gas station was not visible from freeway exit, finding that the articulated factors "in their totality ... eliminate a substantial portion of innocent travelers" and, therefore, there was reasonable suspicion); United States v. Moreno-Chaparro, 180 F.3d 629, 631-2 (5th Cir. 1998)(the court examined each factor the agent offered and found no reasonable suspicion where driver was 60 miles north of border at 2:00 p.m. [known to be border patrol shift change], was a male driving a car registered to a female, the vehicle type -- a Chevrolet truck, and the driver slowed down to look at the checkpoint and seemed surprised to see an officer there, ruling that it would be "manifestly unreasonable to target every Chevrolet pickup truck driven on Texas highways" and finding that each factor the government relied upon was "unremarkable and unsuspicious."); United States v. Jerez, 108 F.3d 684, 693-4 (7th Cir. 1997)(the court examined each factor articulated by officers, including two-door "target" vehicle, license plates from a source state, vehicle was parked near an airport and the interstate, and a criminal history check showed

a suspended driver's license and an arrest or conviction for smuggling contraband into a Florida jail, determining there was no reasonable suspicion, noting the first three factors would be true of innocent travelers and although innocent factors taken together can support reasonable suspicion, they did not here); United States v. Bloomfield, 24 F.3d 1043, 1047-8 (8th Cir. 1994)(en banc)(court conducted a factor-by-factor analysis holding there was no reasonable suspicion for defendant's continued detention after being stopped for an unlawful lane change based upon defendant's hands shaking and nervous appearance, red eyes, opening the truck door only partially upon exiting, a strong deodorant smell emanating from the truck, and defendant had a pager, commenting that: "conduct typical of a broad category of innocent people provides a weak basis for suspicion."); United States v. De La Cruz-Tapia, 162 F.3d 1275, 1276-80 (10th Cir. 1998)(court conducted a factor-by-factor approach holding defendant's lack of eye contact, abrupt exit from highway, activities at gas station, age and size of defendant's car, and fact that the car had crossed the United States-Mexico border three times in three days did not establish reasonable suspicion); United States v. Tapia, 912 F.2d 1367 (11th Cir. 1990)(holding that factors such as being Mexican, having few pieces of luggage, being visibly nervous or shaken upon encounter with police, and traveling on the interstate with out-of-state plates did not provide a minimal, particularized basis for reasonable suspicion for further detaining defendants after a speeding citation, even when considered together, cautioning that "in formulating such common-sense conclusions, neither police officers nor courts should sanction as 'reasonably suspicious' a combination of factors that could plausibly describe the behavior of a large portion of motorists engaged in travel upon our interstate highways.").

Here, the Ninth Circuit's opinion considered all of the circumstances, including all of the factors the government offered to support the stop, examined the record in detail, and correctly

determined that seven factors the district court relied upon had no objectively reasonable basis and added no level of suspicion to the equation. This did not create a new rule of law. Instead, the opinion painstakingly set forth a detailed analysis explaining why each of the seven factors was not objectively reasonable and did not add anything to the reasonable suspicion inquiry under the circumstances of this case.

IV. Factors in this Case

One, the minivan slowed as it approached the border patrol vehicle.[7] The opinion concludes that slowing down in the presence of law enforcement officers is a perfectly normal response that does not indicate criminal activity – a fact the Ninth Circuit has repeatedly acknowledged. *See Hernandez-Alvarado, 891 F.2d at 1419; Garcia-Camacho, 53 F.3d at 247.* The government's petition ignores the well-documented fact that law-abiding people become nervous when they encounter law enforcement officers. Id. Moreover, Agent Stoddard only guessed Mr. Arvizu's speed and admitted he did not stop Mr. Arvizu's vehicle for a traffic violation. In other words, the Ninth Circuit concluded that, under the facts of this case, there was no objectively reasonable basis to believe this fact was suspicious of criminal activity. The Fifth Circuit has also recognized that slowing down after a marked patrol unit turns to follow is not unusual and is the expected reaction. *United States v. Diaz, 977 F.2d 163, 165 (5th Cir. 1992); United States v. Samaguey, 180 F.3d 195, 197-8 (5th Cir. 1999)(the court found reasonable suspicion but cautioned that slowing down upon seeing an agent is cautious driving and due little weight, that driver's deceleration and swerving*

[7] The government also complains of the van's "abrupt" turn. But Agent Stoddard could not characterize the driving as evasive or dangerous and did not stop Mr. Arvizu for traffic reasons. Also, the "turn" took place at a "T" junction and Mr. Arvizu signaled well in advance of turning. (Tr. 12/8/98 20-1,44-5,54,71).

was entitled to little or no weight, and overall, the driving behavior weighed only slightly in favor of reasonableness.).

Two, Mr. Arvizu's failure to acknowledge Agent Stoddard. Here, Agent Stoddard's testimony took this boilerplate claim one step further by claiming that area residents normally smile and wave at him. (RT42,ER72). The Ninth Circuit has long recognized that a person's failure to acknowledge a law enforcement officer does not ordinarily provide a basis for suspecting criminal activity. Id. This is also consistent with this Court's recognition in *Royer* that people have the right to go about their business and ignore police contact when there is no reasonable suspicion. Thus, the opinion correctly noted that there was nothing "out of the ordinary" to convert this fact into a suspicious circumstance. The Fifth Circuit has also ruled that failure to make eye contact with agents is not objectively suspicious and so cannot weigh in the reasonable suspicion calculus. *Escamilla, 560 F.2d at 1233 (failure to look or wave at the agents deserves no consideration); United States v. Lopez, 564 F.2d at 712 (noting that failure to make eye contact with strangers is so commonplace that it may be the rule rather than the exception).*

The government's petition also tries to convert Agent Stoddard's failure to recognize the van as a local vehicle into a suspicious factor. (Pg. 16-7). The Ninth Circuit ruled that in this case, it was not relevant because "evidence introduced at the suppression hearing made it clear that the area in question is one that is used for many purposes by different kinds of people – local residents ... and tourists.... Accordingly, it is not surprising that a Border Patrol agent would not recognize every passing car." *(232 F.3d at 1249-50); Contrast United States v. Hernandez-Gonzalez, 608 F.2d 1240, 1243 (9th Cir. 1979)(finding agent's failure to recognize car or its occupants on lightly-traveled road was a factor contributing to reasonable suspicion).* Thus, there was no objective basis in this

case to believe that use of the road by someone other than a local resident was suspicious of criminal activity.

Three, the children waved in a manner the agent believed was abnormal. The government's characterization of the waving as abnormal and, therefore, a factor bearing upon reasonable suspicion overlooks the obvious – that the abnormal behavior should be on the part of the person suspected of engaging in criminal activity. And there was no basis for Agent Stoddard's supposition that the children had been coached to wave. Although there is no precedent for this factor, the opinion recognized it as a classic case of "damned if you do, equally damned if you don't."[8] Agent Stoddard had barely finished criticizing the adults for not waving, when he testified that it was suspicious that the children were waving. The opinion notes this incongruity, then remarks that because children are well-known to act impetuously and in ways that embarrass their parents, the children's waving here did not objectively contribute to reasonable suspicion. The totality-of-the-circumstances analysis does not circumvent common sense observations such as these.

Four, different agents had stopped one minivan containing marijuana along the same route during the month before this arrest.[9] The opinion correctly rules that one stop of a similar vehicle cannot taint all minivans – another common sense observation. Also, because Agent Stoddard

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[8]The Ninth Circuit has often criticized the "heads I win, tails you lose" approach to reasonable suspicion factors. *See Gonzalez-Rivera, 22 F.3d at 1446-7; Montero-Camargo, 208 F.3d at 1136.* The Fifth Circuit has also condemned this practice. *See Escamilla, 560 F.2d at 1233 (finding that because a previous opinion found a driver's repeated and nervous glances at the agent suspicious, an opinion holding a driver's failure to look was also suspicious would put officers in a classic "heads I win, tails you lose" position and the driver could only lose); Moreno-Chaparro, 180 F.2d 629.*

[9] The earlier incident clearly was not connected with this case. (12/7/98 Tr12,38-9).

stopped the van in this case for immigration reasons, not because he believed it contained drugs, this factor seems to have been thrown into the mix after-the-fact as "window dressing" and could not have been part of the reason Agent Stoddard made the stop. There was nothing unusual about this minivan. It had a valid registration, did not appear to be riding low as if heavily laden, the windows were not obstructed, and there was no indication it had recently crossed the border. Thus, under the circumstances of this case, it was not objectively suspicious that a minivan would be driving on this road, adjacent to a popular recreation area, in broad daylight..

Five, Agent Stoddard did not recognize the minivan as belonging to a local resident. Given the totality of the circumstances here, which included ample evidence that the route of travel encompassed a multi-use area frequented by non-local Douglas area residents (30 miles away), this factor is not objectively suspicious. None of the cases the government cited involved travel in a multi-use area adjacent to a National Forest or Monument.

Six, the registration check revealed a valid registration to Leticia Arvizu at an address on a Douglas street characterized as "notorious" for alien smuggling. Living in the wrong neighborhood, however, does not subject a person to unlawful stops and searches. *Jiminez-Medina, 173 F.3d at 755.* Agent Stoddard lacked even a shred of negative information about Leticia Arvizu and her Douglas address – another factor that negates reasonable suspicion. It is improper to forever cast a net of suspicion over the Arvizus and other Douglas residents merely because they live in an area that is "notorious" for alien smuggling. It is difficult to imagine living in an area in Douglas or Nogales – two of Arizona's largest border cities – that Border Patrol would not describe as "notorious" for smuggling activity. The Ninth Circuit, which receives a good many border cases, is in a position to recognize this fact. The opinion also notes the lack of foundation for Agent Stoddard's opinion that

the address was in a high-crime area and, accordingly, finds the district court's reliance upon it similarly misplaced. This factor was not objectively suspicious.

And seven, the children's knees were slightly raised – a fact Agent Stoddard claims he saw either when the van quickly passed in front of his vehi~~cle or while follo~~wing it from behind. The opinion, again using common sense, determined that this factor was equally, if not more consistent, with innocent explanations, such as camping and picnic equipment. The factor did not add suspicion because it was too common to be meaningful, not because there was only a possible innocent explanation, as the government claims. In other words, this factor was not probative of anything.

The government's petition states that "the apparent presence of a substantial amount of cargo" in a vehicle supports reasonable suspicion. (Pg.18-9). The cited cases, without exception, refer to vehicles riding low that appear heavily-laden. Mr. Arvizu's van was not riding low and it is too much to infer alien smuggling from children sitting with their knees lower than chest level. If anything, the agent's observations should have completely negated any suspicion in this regard because the fact that the vehicle was not riding low meant that there could be no weighty cargo for the children's feet to be resting on.

The opinion correctly determined that these seven factors were not objectively suspicious, given the totality of the circumstances in this case, and that the district court erroneously relied upon them. The opinion did not hold, as a matter of law, that all of these factors would be irrelevant in other cases.[10] The factors were of zero probative value in this case. The government cannot

[10]The opinion ruled that the following factors should not be considered, based upon Ninth Circuit precedent: (1) the minivan slowing down as it approached the Border Patrol vehicle; *(232 F.3d at 1249-50)*; and (2) the vehicle's registration to a Douglas address in a block notorious for smuggling. *(232 F.3d at 1250)*. The opinion ruled the other five factors were not relevant in this case.

transform a baseless stop into one based upon reasonable suspicion by simply aggregating any number of "zeroes."

The Ninth Circuit correctly decided that the weight given to the remaining four factors, in combination, fell short of reasonable suspicion. Those factors are: (1) shift change; (2) a minivan; (3) the road could be used for checkpoint evasion; and (4) the road was sometimes used by smugglers.

First, the shift change factor does not warrant much discussion. It is hard to believe that traveling from Douglas, Arizona through an adjacent recreational area at 2:15 p.m., in broad daylight, could be characterized as unusual or suspicious. Yet Agent Stoddard and the district court paired this time with a 3:00 p.m. Border Patrol shift change, which the agent claimed is common knowledge amongst smugglers seeking to avoid Border Patrol. This claim makes no sense because the stop occurred a distant forty-five minutes before shift change and Agent Stoddard testified that agents might use Leslie Canyon Road (the route Mr. Arvizu traveled) to return to the checkpoint for shift change, making travel along it likely to draw the attention of Border Patrol. Under the government's view, it is unwise for area residents to travel anywhere within one hour of shift changes, some six hours per day, lest their activities be interpreted as suspicious. A net this wide would capture a significant portion of the day. The Fifth Circuit recently found: "While we may empathize with the Border Patrol's concerns regarding increased exposure during times of reduced manpower, we are not willing to sacrifice the constitutional protections of drivers to lessen perceived adverse impact resulting from the decision of the Border Patrol to change shifts at the same time everyday." *Montero-Chaparro, 180 F.3d at 629.*

Second, the minivan factor can also be quickly dismissed because smugglers prefer whatever

vehicle is roomy enough to hide aliens or contraband. There is nothing about a minivan that suggests illegal activity – especially a mini-van with a male driving, an adult female passenger, and three children – a typical family. Because minivans are popular family cars, this factor adds little, perhaps nothing, to the equation. Moreover, agents have depicted whole classes of vehicles as suspicious, depending upon the case – pickup trucks, vans, cars with big trunks, Monte Carlos – so, the list could continue indefinitely.[11] Similarly, Agent Stoddard's failure to recognize Mr. Arvizu's van as a local vehicle adds nothing, especially given the agent's conceded lack of familiarity with the area and the fact that non-locals use the area for recreation. Thus, there is no objectively reasonable basis for determining that a minivan in the area in the middle of the day was suspicious.

Agent Stoddard did not testify that the van appeared to be riding low or was heavily loaded – a detail he certainly would have noticed if the road was as rough and bumpy as he claimed. The appearance of a heavily-laden vehicle is a factor commonly observed by agents and appears throughout reasonable suspicion cases. *See e.g. Brignoni-Ponce, 422 U.S. at 885; United States v. Harrington, 636 F.2d 1182, 1184 (9th Cir. 1980); See also United States v. Medina-Gasca, 739 F.2d 1451 (9th Cir. 1984) (finding multiple factors supported reasonable suspicion including observation of two vans traveling together that appeared to be riding low as if heavily laden with possible illegal aliens).* The absence of this fact, therefore, negated suspicion.

Third, the claimed checkpoint evasion likewise adds little to the equation. Driving a route that avoids a checkpoint, without other indicia of illegal activity, cannot be used to justify a stop. *United States v. Ogilvie, 527 F.2d 330 (9th Cir. 1975).* In *Ogilvie*, a defendant drove within sight

[11]Every type of car imaginable has been described as commonly used for smuggling. *See United States v. Rodriguez, 976 F.2d 592, 596 (9th Cir. 1992)("We may confidently assert that all types of vehicles have been used in smuggling operations at some place.").*

of a Border Patrol checkpoint, exited the highway, crossed the overpass, then returned to the interstate, having driven around the checkpoint -- a clear and obvious checkpoint evasion. The Ninth Circuit ruled that avoiding a checkpoint, without more, did not give rise to reasonable suspicion. *Id. at 331-2.* This is consistent with *Royer,* where an individual is free to go about his business, and *Martinez-Fuerte*, which suggests one reason checkpoints are reasonable under the Fourth Amendment is because people will know about them and can avoid them.

But unlike *Ogilvie,* this case is not a clear, or even probable, example of checkpoint evasion. Although the route could have been used to avoid the checkpoint, there were many legitimate destinations along the route Mr. Arvizu traveled – even after making the last turn onto Kuykendall Cutoff Road. The district court did not rule that the only reason or a likely reason a vehicle would be traveling along Kuykendall Cutoff Road at 2:15 p.m. was to evade the checkpoint. Such a finding would not have been supported by the facts. But this is precisely what the government urges. The district court merely determined that the next recreation area was "quite a few miles to the north" and also accessible via a paved road, I-181. (RT135-6;ER 165-6). Finally, the local vehicle registration provided a valid reason for the van to be in the area. The government's reliance upon checkpoint evasion as a factor is misplaced because there was no clear checkpoint evasion and the inferences drawn from the mere possibility of checkpoint evasion do not add much, if anything, to the reasonable suspicion inquiry.

Fourth, the road was sometimes used by smugglers. This factor has low probative value. It provides background, but little else. Basing reasonable suspicion upon this factor would mean that sightseers traveling in areas where smuggling activity takes place would be subject to random stops and searches, effectively zoning our border areas into reasonable suspicion zones.

Courts should examine all factors, including those which do not support reasonable suspicion. *See Gonzalez-Rivera, 22 F.3d at 1447(defendants' IHOP uniforms, lack of evasion, and the normal appearance of the car were factors weighing against reasonable suspicion).* The government's analysis ignores facts which squarely refute its claims of remoteness and the lack of legitimate destinations along the route Mr. Arvizu traveled.

V. Summary

Districts from areas along the United States-Mexico border are unique. The Fifth and Ninth Circuits address a lion's share of the roving- patrol-stop cases and have identified patterns of agents repeatedly flip-flopping on whether a factor or its opposite is suspicious and repeatedly parroting the same boilerplate factors to justify stops where reasonable suspicion was lacking. These courts are in a unique position to assess which factors are relevant, which factors are consistently being abused, and how these factors should weigh in the reasonable suspicion inquiry. The Ninth Circuit's opinion does exactly what this Court directed in *Ornelas:* it provides the explicit guidance necessary for the growing law enforcement presence along the border.

The Fourth Amendment protects innocent, law-abiding persons, who have the right to go about their business without interruption, delay, or unwarranted intrusion, from overbearing or harassing police conduct carried out solely on the basis of arbitrariness and imprecise stereotypes. *Terry at 14-5.* We currently have no way of knowing how many innocent people are subjected to suspicionless stops.[12] Citizens who have been stopped pointlessly are largely invisible. The

[12]*Almeida-Sanchez, 413 U.S. 273, n.5 ("... there is no telling how many perfectly innocent drivers have been stopped on this road without any probable cause, and been subjected to a search in the trunks, under the hoods, and behind the rear seats of their automobiles."); United States v. Guerrero-Barajas, 240 F.3d 428, 436 (5thCir. 2001), reh. denied, ___ F.3d ___(Mar.19, 2001)(J.Dennis, dissenting).*

exclusionary rule does not apply to them and they are unlikely to bring civil suits. The United States-Mexico border is the setting for an ever-increasing force of Border Patrol agents. As of September, 1998 approximately 7,357 Border Patrol agents patrolled our 1,945-mile of border with Mexico compared with 289 patrolling our 3,987-mile border with Canada. *K.Johnson, The Case Against Race Profiling in Immigration Enforcement, 78 Wash.U.L.Q. 675, 736 n.295 (Fall, 2000).* The number of Border Patrol agents along the United States-Mexico border has steadily increased since 1998.[13]

The government's claim that the decision overly burdens law enforcement officers is absurd. Holding agents to reasonable suspicion does not create an undue burden. In fact, police already have considerable discretion to stop. And because courts are not permitted to inquire into the subjective motives of police officers who make traffic stops, it is difficult to uncover pretextual stops. *Whren v. United States, 517 U.S. 806 (1996).*

The government's petition insinuates that the Ninth Circuit has on numerous occasions flouted this Court's reasonable suspicion precedent, requiring redress from this Court. This is a far cry from reality. In truth, the Ninth Circuit has conscientiously applied the law set forth by this Court in *Brignoni-Ponce* and *Cortez.* It is not surprising that Ninth Circuit jurisprudence generates landmark decisions when one considers the large border areas falling within its jurisdiction (the government's petition asserts that two-thirds of Border Patrol apprehensions occur within the Ninth Circuit). The Ninth Circuit is in the best position to identify patterns, detect abuses, and to publish

[13]The Executive Summary of the President's Fiscal 2002 Immigration Budget, prepared by the Office of Public Affairs, INS, on April 9, 2001 states that the Fiscal Year 2002 Budget plans to increase the number of Border Patrol agents by 570 to a record level of more than 10,000 agents, which is more than double the level in Fiscal Year 1993.

opinions setting forth fact-specific patterns in reasonable suspicion cases – as occurred in this case. The opinion here did not narrow the totality-of-the-circumstances test as the government claims; instead, it provides explicit guidance to those involved in roving-patrol stops.

The "reasonable suspicion" doctrine is based upon notions of liberty and freedom from state intrusion in a mobile society and "must be founded on an objective basis for suspecting that a particular person is engaged in criminal activity, lest we "sweep many ordinary citizens into a generality of suspicious appearance merely on hunch." *Jiminez-Medina, 173 F.3d at* 755, (*citing Rodriguez, 976 F.2d at 596*). Every factor the government offers in this case falls into the same category: innocent behavior which is not consistent with criminal activity. The flip side of each factor would also support reasonable suspicion. The government's arguments would place motorists in Southern Arizona in a "lose, lose" situation – intruding upon their liberty whether they engage in conduct or avoid it. The Ninth Circuit did in this case what this Court directed and what it has done in so many others – found no reasonable suspicion where the factors indicated by Border Patrol do not provide an objectively reasonable basis for singling out a citizen as being engaged in criminal activity, but instead encompass a large number of innocent people. In, *Hernandez-Alvarado, 891 F.2d at 1420 (J. Alarcon, concurring opinion),* Judge Alarcon wrote:

> To uphold the district court's order, we would have to condone random detention and searches of a large number of American residents simply because they live in a depressed crime ridden border area, drive old cars, when accompanied by their families, and look straight ahead after seeing a law enforcement vehicle.... We are compelled to reverse the district court's order upholding the detention of presumably innocent travelers.

The government asks for unlimited discretion under the guise of reasonable suspicion – a border exception to the Fourth Amendment -- claiming that a list of factors agents submit should be

automatically accepted by reviewing courts, even though the factors are innocuous and do not implicate the detained person in criminal activity. The government asks for a subjective, not objective test – an approach this Court has squarely prohibited. The Ninth Circuit opinion simply follows this Court's precedents and requires that government agents have objectively reasonable suspicion to stop a vehicle, something which *Terry* recognized reduces the risk of intrusive and arbitrary law enforcement contact with law-abiding people to acceptable levels.

CONCLUSION

Although reasonable suspicion stops may impact some innocent people, the government would cast an unconscionably large net of suspicion over all Southern Arizona residents. This Court has repeatedly declined to give Border Patrol agents unbridled discretion to stop motorists during roving patrols. The factors Agent Stoddard articulated in this case describe a large number of innocent motorists who could be randomly detained. The Ninth Circuit opinion correctly applies the totality-of-the-circumstances standard this Court has developed and refined during the past two decades. The opinion applies well-settled rules and examines all of the factors the district court considered in the context of the particular facts of this case. Seven factors the district court relied upon added nothing to the reasonable suspicion equation because it was not objectively reasonable to view the factors as suspicious given the facts of this case. The remaining four factors, although relevant, were too weak to provide reasonable suspicion to stop Mr. Arvizu's vehicle. The combination of factors provided no reasonably objective basis to suspect that the driver was engaged in criminal activity. This Court should deny the government's petition for certiorari because the opinion, while correctly applying this Court's reasonable suspicion analysis, simply holds that Agent Stoddard lacked reasonable suspicion to stop Mr. Arvizu. The opinion correctly set forth the applicable law, did not create a circuit conflict, did not change Supreme Court precedent, and correctly applied the facts to the law.

RESPECTFULLY SUBMITTED: May 3, 2001

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APPENDIX A

LEGEND: MAP OF DOUGLAS, CHIRICAHUA MOUNTAIN AREA

Notations:

The blue highlighted area depicts Mr. Arvizu's route of travel.

#1 marks the Border Patrol Checkpoint at the intersection of Rucker Canyon Road and Highway 191.

#2 marks the approximate location of Border Patrol sensors.

#3 marks the approximate area where Mr. Arvizu's van passed Border Patrol Agent Stoddard's stationary vehicle.

#4 marks the approximate area where the Agent Stoddard stopped Mr. Arvizu's van.

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